Khalek bin Awang & Anor v Koperasi Perumahan Kluang Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS C-02(NCVC)(W)-554–03 OF 2019 AND C-02(NCVC)(W)-555–03 OF 2019
YAACOB MD SAM, RAVINTHRAN AND MOHD SOFIAN JJCA
18 AUGUST 2021

Contract — Joint venture — Fraud and misrepresentation — Plaintiff entered into joint venture ('JV') to plant oil palm on land on understanding owner of land was party to the JV — Subsequent to signing of JV agreement real land owner denied being party to the JV and stopped JV works on the land — Plaintiff sued real land owner for interference thinking it was 'interfering' because law firm in JV transaction ('KA') misrepresented that it had acted for land owner and that the JV agreement was valid and proper — Trial of suit between plaintiff and real land owner revealed purported signatures of directors of land owner in JV agreement were forgeries — Court declared JV agreement null and void and ordered plaintiff to pay damages and legal costs to real land owner — Whether KA had collaborated with fraudster claiming to be director of land owner to cause plaintiff's involvement in the JV agreement — Whether plaintiff succeeded in establishing KA was liable for fraud, conspiracy to commit fraud and negligence — Whether KA was liable to compensate plaintiff for all losses it suffered arising from the fake JV agreement including all damages and legal costs it had to pay land owner — Whether application of 'but for' causation test showed that if not for KA's assurances and misrepresentations plaintiff would not have entered into JV agreement or sued owner of the land

The appellants in the first appeal herein ('the partners') were partners in a law firm ('Khalek Awang'). They and a third individual ('DSN') were jointly sued by Koperasi Perumahan Kluang Berhad ('the Koperasi') for losses that it incurred after it was induced to enter into a joint venture ('JV') project which turned out to be a scam. A broker had brought representatives of the Koperasi to Khalek Awang after persuading the Koperasi to enter into a joint venture with two other companies to plant oil palm on a piece of land leased from its owner ('Pravest'). All parties were given the impression that DSN was the chairman of Pravest and that Khalek Awang acted for Pravest. When all parties signed the JV agreement it was noted that two directors of Pravest had purportedly pre-signed the agreement. For making the JV possible, DSN demanded, and was paid, RM500,000 by the Koperasi as his 'consultation fee' in the transaction and the money was paid to Khalek Awang, who, after deducing their legal fees, paid the remainder directly to DSN. The JV partners thereafter commenced work on the land but it came to an abrupt halt when

they and Khalek Awang received letters from another firm of solicitors ('Cheang & Ariff') stating that they acted for Pravest and that none of the directors of Pravest had entered into any JV agreement in respect of the land. Since Khalek Awang continued to maintain that all was well and proper with the JV agreement despite the Cheang & Ariff letter, the Koperasi sued Pravest and sought an injunction to prevent it from interfering with work on the project. Only during the trial of the suit between the Koperasi and Pravest did it emerge that the signatures in the JV agreement purportedly belonging to the two directors of Pravest were forgeries. The trial court declared the JV agreement null and void, dismissed the Koperasi's claim against Pravest and ordered it to pay Pravest RM1,104,402.91 in damages apart from other legal costs. The Koperasi sued the partners to recover its losses arising from the JV agreement premised on fraud, fraudulent misrepresentation, conspiracy to defraud and/or negligence. The partners refuted the claims and also said they did not owe the Koperasi any duty of care because the Koperasi had independent legal representation at all material times. The partners claimed they never knew that DSN was a fraudster and believed he was legitimate because he had shown them a letter and company resolution from Pravest appointing Khalek Awang as its solicitor in the JV agreement and had also produced the original title deeds to the land. The partners also claimed that the RM500,000 that was paid to DSN was authorised by the Pravest company resolution. Following a trial, the High Court found that the partners had conspired with DSN to commit fraud by representing that Khalek Awang had been appointed to act for Pravest in the JV transaction. The Koperasi was awarded: (a) the RM500,000 it had paid to Khalek Awang; (b) RM305,223.45 it had paid to contractors to carry out works on the land; (c) RM113,995 in legal fees that it had incurred in its litigation with Pravest; and (d) RM30,000 in costs. The trial court disallowed the Koperasi's claims for the RM1,134,394 in damages that it was ordered to pay Pravest in the earlier suit, RM1.166m that the Koperasi had paid to the brokers of the JV agreement, and a total of RM1m in exemplary and aggravated damages that it claimed from Khalek Awang. The instant appeal by the partners was against the trial court's finding that they were liable to pay the Koperasi whilst the appeal by the Koperasi was for judgment on those heads of damages that were disallowed by the trial court and for an increase in the costs that it was awarded in the suit. In their appeal, the partners submitted, inter alia, that: (i) the trial court had applied the wrong standard of proof of fraud; (ii) they owed no duty of care to the Koperasi; (iii) negligence had not been proven against them; and (iv) no actual deceit and dishonest intent on their part was proven at the trial as the mere presence of suspicious circumstances was insufficient to ground a finding of fraud or conspiracy to defraud.

Held, unanimously dismissing the appeal of the partners and ordering them to pay the Koperasi (in addition to the amounts ordered by the High Court) the further sum of RM1,134,397 in damages:

(1) The trial judge did not err in applying the 'balance of probabilities' standard of proof of fraud in civil cases as that was the standard laid down by the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1. There were only two standards of proof in this country — 'beyond reasonable doubt' for criminal cases and 'balance of probabilities' for all civil cases, even if criminality was alleged. There was no intermediate standard of proof between the two (see paras 15–17).

(2) The trial judge did not err in drawing the inferences that he did from the ample circumstantial evidence to conclude that the partners were not innocent of the wrong-doing committed by DSN and that they worked hand-in-glove with him. The circumstantial evidence included the following: (a) DSN claimed to be the chairman of Pravest, but the company resolution that DSN produced did not say that he was the chairman of the company, nor did it authorise DSN to deal with the Koperasi in respect of the JV agreement; (b) the company search done on Pravest two weeks after the JV agreement was prepared did not show that DSN was a director of Pravest, yet Khalek Awang did not alert the Koperasi or its solicitors about this fact. The name of one of the directors of Pravest in the search result also did not match the name given in the Pravest company resolution as it was wrongly spelt. There was reason to believe the company resolution was backdated after it was signed as the JV agreement was referred to in the past tense although the letter purportedly appointing Khalek Awang to represent Pravest was dated the same day as the company resolution; (c) when Khalek Awang received the letter from Cheang & Ariff, the partners would have known at that point that DSN was a cheat who pretended to represent Pravest, yet Khalek Awang continued to maintain the pretense that Pravest had properly appointed them in the JV transaction; (d) evidence was tendered at the trial that the partners were the secretaries of companies owned by DSN's family and that the address of one of those companies was the same as Khalek Awang's address; (e) the letter purportedly from Pravest that Khalek Awang had with them stated Pravest's address as being in Kuantan but the company search showed that the company's address was in Kuala Lumpur. The company's telephone number, fax number, email address and website address were not stated in the letterhead and Khalek Awang was not in the panel of lawyers who acted for Pravest; and (f) the partners never cross-checked with anyone in Pravest on whether DSN was authorised to be paid the RM500,000 that he demanded from the Koperasi as the Pravest company resolution did not authorise it (see paras 19–21, 28–29 & 32).

(3) The partners as lawyers should have known that the documents presented by DSN were dubious. Even if 'mere omissions' and 'failure to be put to further inquiry' were not sufficient for a finding of fraud, fraudulent misrepresentation or conspiracy to commit fraud, there was

evidence that Khalek Awang knew for a fact from the company search that DSN was not listed as a director of Pravest. Although the letter from Cheang & Ariff would have confirmed the fact that DSN was a fraudster and that Khalek Awang was never appointed by Pravest, the partners warranted to the Koperasi that the JV agreement was proper and that their client owned the land. This representation caused the Koperasi to be embroiled in an expensive litigation with Pravest which ultimately failed for the Koperasi. Furthermore, the partners had maintained a business relationship with DSN as company secretaries of companies controlled by DSN's family up till the time of the trial. The partners had also improperly released monies to DSN. Even the evidence in respect of the fees paid to Khalek Awang was inconsistent and contradictory. In the circumstances, all the strands of circumstantial evidence that was considered by the trial judge were sufficient to find the partners liable for fraud and conspiracy to defraud on a balance of probabilities (see paras 33–34).

(4) The partners' claim that they owed no duty of care to the Koperasi was unsustainable. Under common law, a professional person who made a negligent misstatement to another was liable for the consequences if the latter relied upon it and suffered loss irrespective of the fact that there was no contractual relationship. The duty arose in the law of tort. In the instant case, there was overwhelming evidence that the partners were negligent in maintaining that they acted for Pravest when the JV agreement was executed. Even after the Cheang & Ariff letter was brought to their attention, the partners insisted that the JV agreement had been properly executed with the authority of Pravest. It was for that reason that the Koperasi commenced legal action against Pravest and suffered financial loss when the JV agreement was declared null and void. The negligence of the partners had therefore caused loss to the Koperasi (see paras 36–37).

(5) The trial judge erred in not compensating the Koperasi for the RM1,134,397 in damages that it had to pay Pravest in the suit between the parties. The judge failed to apply the 'but for' test to determine the causation of loss or injury to a plaintiff in tort cases. The Koperasi had proven that 'but for' the false representation of the partners that they acted for Pravest, the Koperasi would not have sued Pravest to enforce its rights under the JV agreement. The causal link between the tort committed by the partners and the damages that the Koperasi was ordered to pay Pravest was clearly proven and therefore the appeal in respect of this head of loss had to be allowed (see paras 41–44).

(6) The trial judge refused to award the Koperasi the RM1,166,000 commission it claimed to have paid the broker in relation to the JV transaction on the ground that that loss had not been proven. This court

would therefore not interfere with that decision. Similarly, the trial judge's exercise of discretion to refuse to award aggravated and exemplary damages to the Koperasi on the ground that it was not warranted, would also not be interfered with. Since the RM30,000 in costs awarded to the Koperasi at the end of the trial was not manifestly inadequate, interference with the discretion of the trial judge to award that sum was not warranted (see paras 45–51).

[Bahasa Malaysia summary

Perayu-perayu di dalam kes rayuan pertama disini ('rakan-rakan kongsi') adalah rakan-rakan kongsi di firma guaman ('Khalek Awang'). Mereka dan pihak ketiga ('DSN') telah disaman secara bersesama oleh Koperasi Perumahan Kluang Berhad ('Koperasi') di atas kerugian-kerugian yang diperoleh selepas didorong untuk memasuki projek usaha sama ('JV') yang ternyata satu penipuan. Seorang broker telah membawa wakil koperasi kepada Khalek Awang selepas memujuk Koperasi tersebut untuk satu usahasama dengan dua syarikat lain untuk menanam kelapa sawit di atas sebidang tanah yang dipajak daripada pemiliknya ('Pravest'). Semua pihak telah diberi gambaran bahawa DSN adalah pengerusi Pravest dan Khalek Awang bertindak untuk Pravest. Apabila semua pihak menandatangani perjanjian JV, dinyatakan bahawa dua pengarah Pravest telah kononnya telah menandatangani perjanjian itu. Untuk membuat JV mungkin, DSN menuntut, dan dibayar, RM500,000 oleh Koperasi sebagai 'yuran perundingan' dalam transaksi itu dan wang itu dibayar kepada Khalek Awang, yang, selepas ditolak yuran guaman mereka, membayar baki terus kepada DSN. Rakan kongsi JV kemudiannya memulakan kerja di atas tanah tetapi ia terhenti secara tiba-tiba apabila mereka dan Khalek Awang menerima surat daripada firma peguam cara lain ('Cheang & Ariff') yang menyatakan bahawa mereka bertindak untuk Pravest dan bahawa tiada seorang pun pengarah Pravest mememasuki mana-mana perjanjian JV berkenaan dengan tanah itu. Oleh kerana Khalek Awang terus menyatakan bahawa urusan tersebut adalah teratur dengan perjanjian JV walaupun terdapat surat Cheang & Ariff tersebut, Koperasi telah menyaman Pravest dan meminta injunksi untuk menghalangnya daripada mengganggu kerja-kerja projek itu. Hanya semasa perbicaraan saman antara Koperasi dan Pravest, telah muncul isu bahawa tandatangan dalam perjanjian JV yang kononnya milik kedua-dua pengarah Pravest adalah palsu. Mahkamah di peringkat perbicaraan telah memutuskan bahawa perjanjian JV tersebut adalah terbatal dan tidak sah, menolak tuntutan Koperasi terhadap Pravest dan memerintahkannya membayar ganti rugi sebanyak RM1,104,402.91 selain kos guaman lain. Koperasi tersebut telah menyaman rakan-rakan kongsi tersebut untuk memperoleh jumlah kerugian yang timbul dari perjanjian JV tersebut berdasarkan kausa tindakan frod, kenyataan palsu, konspirasi untuk menipu dan/atau kecuaian. Rakan-rakan kongsi tersebut telah menafikan tuntutan-tuntutan tersebut dan menyatakan bahawa mereka tidak mempunyai tugas berhati-hati terhadap Koperasi tersebut kerana Koperasi tersebut

mempunyai peguamnya yang tersendiri. Rakan-rakan kongsi tersebut telah menghujahkan bahawa mereka tidak pernah mengetahui bahawa DSN adalah penipu dan percaya bahawa dia adalah benar kerana dia telah menunjukkan surat dan resolusi syarikat daripada Pravest melantik Khalek Awang sebagai peguamnya dalam perjanjian JV dan juga telah menghasilkan surat hak milik asal kepada tanah itu. Rakan-rakan kongsi tersebut juga mendakwa bahawa RM500,000 yang dibayar kepada DSN telah diberi kuasa oleh resolusi syarikat Pravest. Selepas perbicaraan penuh, Mahkamah Tinggi mendapati bahawa rakan-rakan kongsi itu telah bersekongkol dengan DSN untuk melakukan penipuan dengan mewakili Khalek Awang dilantik untuk bertindak bagi Pravest dalam transaksi JV. Koperasi telah dianugerahkan: (a) jumlah sebanyak RM500,000 yang telah dibayar kepada Khalek Awang; (b) RM305,223.45 yang telah dibayar kepada kontraktor untuk menjalankan kerja-kerja di atas tanah; (c) RM113,995 sebagai yuran guaman yang telah dikenakan dalam litigasinya dengan Pravest; dan (d) RM30,000 kos. Mahkamah perbicaraan menolak tuntutan Koperasi untuk ganti rugi RM1,134,394 yang diperintahkan untuk membayar Pravest dalam saman terdahulu, RM1.166 juta yang telah dibayar oleh Koperasi kepada broker perjanjian JV, dan sejumlah RM1 juta sebagai ganti rugi teladan dan teruk yang dituntut daripada Khalek Awang. Rayuan ini telah difailkan oleh rakan-rakan kongsi tersebut atas keputusan mahkamah perbicaraan bahawa mereka bertanggungjawab membayar Koperasi manakala rayuan oleh Koperasi adalah untuk penghakiman ke atas ganti rugi yang tidak dibenarkan oleh mahkamah perbicaraan dan menghujahkan, antara lain, bahawa: (i) mahkamah perbicaraan telah menggunakan standard yang salah bukti penipuan; (ii) mereka tidak bertanggungjawab terhadap kecuaian Koperasi; (iii) tidak terbukti kausa tindakan tersebut terhadap mereka; dan (iv) tiada niat tipu daya dan tidak jujur di pihak mereka telah terbukti pada perbicaraan kerana keterangan keadaan tidak mencukupi.

Diputuskan, sebulat suara menolak rayuan rakan-rakan kongsi tersebut dan memerintahkan mereka untuk membayar Koperasi tersebut (dengan tambahan jumlah penghakiman Mahkamah Tinggi) sebanyak jumlah lanjut RM1,134,397 untuk jumlah kerosakan:

(1) Hakim bicara tidak terkhilaf dalam menguna pakai prinsip 'imbangan kebarangkalian' yang merupakan beban pembuktian yang standard seperti di dalam kes Mahkamah Persekutuan di *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1. Cuma ada dua beban pembuktian di mahkamah negara ini iaitu — 'melebihi keraguan munasabah' di kes-kes jenayah dan 'imbangan kebarangkalian' di kes-kes sivil. Tiada beban pembuktian yang lain (lihat perenggan 15–17).

(2) Hakim bicara tidak terkhilaf dalam membuat inferens dari keterangan keadaan yang menyimpulkan bahawa rakan-rakan kongsi tersebut tidak bersalah atas kesalahan yang dilakukan oleh DSN dan bahawa mereka

bekerja secara bekerjasama. Keterangan keadaan adalah seperti yang berikut: (a) DSN mendakwa dia adalah pengerusi Pravest, tetapi resolusi syarikat yang dihasilkan oleh DSN tidak mengatakan bahawa beliau adalah pengerusi syarikat, dan juga tidak memberi kuasa kepada DSN untuk berurusan dengan Koperasi berkenaan dengan perjanjian JV; (b) carian syarikat yang dilakukan ke atas Pravest dua minggu selepas perjanjian JV disediakan tidak menunjukkan bahawa DSN adalah pengarah Pravest, namun Khalek Awang tidak memberi memberitahu kepada Koperasi atau peguamnya mengenai fakta ini. Nama salah seorang pengarah Pravest dalam hasil carian juga tidak sepadan dengan nama yang diberikan dalam resolusi syarikat Pravest kerana ia salah disalah guna. Terdapat sebab untuk mempercayai resolusi syarikat itu disokong selepas ia ditandatangani sebagai perjanjian JV yang disebut pada masa lalu walaupun surat yang kononnya melantik Khalek Awang untuk mewakili Pravest bertarikh hari yang sama dengan resolusi syarikat; (c) apabila Khalek Awang menerima surat daripada Cheang & Ariff, rakan-rakan kongsi tersebut tahu pada ketika itu bahawa DSN berpura-pura mewakili Pravest, namun Khalek Awang terus mengekalkan anggapan bahawa Pravest telah melantik mereka dengan betul dalam transaksi JV; (d) keterangan telah diberikan pada perbicaraan bahawa rakan kongsi itu adalah setiausaha syarikat yang dimiliki oleh keluarga DSN dan bahawa alamat salah satu syarikat itu adalah sama dengan alamat Khalek Awang; (e) surat itu kononnya dari Pravest bahawa Khalek Awang bersama mereka menyatakan alamat Pravest sebagai berada di Kuantan tetapi carian syarikat menunjukkan bahawa alamat syarikat itu berada di Kuala Lumpur. Nombor telefon, nombor faks, alamat emel dan alamat laman web syarikat itu tidak dinyatakan dalam kepala surat dan Khalek Awang tidak berada dalam panel peguam yang bertindak untuk Pravest; and (f) rakan-rakan kongsi tersebut tidak pernah memeriksa silang dengan sesiapa di Pravest sama ada DSN diberi kuasa untuk dibayar RM500,000 yang dia peroleh daripada Koperasi kerana resolusi syarikat Pravest tidak membenarkannya (lihat perenggan 19–21, 28–29 & 32).

(3) Rakan-rakan kongsi sebagai peguam sepatutnya tahu bahawa dokumen yang dikemukakan oleh DSN adalah meragukan. Walaupun 'ketinggalan semata-mata' dan 'kegagalan untuk dimasukkan ke dalam siasatan lanjut' tidak mencukupi untuk melakukan penipuan, salah nyata penipuan atau konspirasi untuk melakukan penipuan, terdapat bukti bahawa Khalek Awang tahu fakta daripada syarikat itu bahawa DSN tidak disenaraikan sebagai pengarah Pravest. Walaupun surat daripada Cheang & Ariff telah mengesahkan hakikat bahawa DSN adalah penipu dan bahawa Khalek Awang tidak pernah dilantik oleh Pravest, rakan-rakan kongsi tersebut memberi jaminan kepada Koperasi bahawa perjanjian JV adalah betul dan bahawa anak guam mereka memiliki

tanah itu. Perwakilan ini menyebabkan Koperasi terjebak dalam litigasi yang tinggi kosnya dengan Pravest yang akhirnya mendatangkan kerugian kepada Koperasi. Selain itu, rakan kongsi tersebut telah mengekalkan hubungan perniagaan dengan DSN sebagai setiausaha syarikat syarikat yang dikawal oleh keluarga DSN sehingga masa perbicaraan. Rakan-rakan kongsinya juga telah melepaskan wang secara tidak wajar kepada DSN. Malah, keterangan berkenaan yuran yang dibayar kepada Khalek Awang adalah tidak konsisten dan bercanggah. Dalam keadaan ini, semua keterangan keadaan yang dipertimbangkan oleh hakim bicara adalah mencukupi untuk mendapati bahawa rakan-rakan kongsi telah bertanggungjawab untuk penipuan dan konspirasi untuk menipu melebihi keseimbangan kebarangkalian (lihat perenggan 33–34).

(4) Dakwaan rakan-rakan kongsi bahawa mereka tidak bertanggungjawab menjaga Koperasi adalah tidak boleh disangkal lagi. Menurut undang-undang, seorang profesional yang cuai terhadap yang lain adalah bertanggungjawab terhadap akibatnya jika kliennya bergantung kepadanya dan mengalami kerugian tanpa mengira hakikat bahawa tidak ada hubungan kontrak. Tugas berhati-hati itu timbul dalam undang-undang tort. Dalam kes ini, terdapat keterangan yang sangat kuat bahawa rakan-rakan kongsi adalah kecuaian dalam mengekalkan bahawa mereka bertindak untuk Pravest apabila perjanjian JV dilaksanakan. Walaupun selepas surat Cheang & Ariff dibawa kepada perhatian mereka, rakan-rakan menegaskan bahawa perjanjian JV telah dilaksanakan dengan betul dengan kuasa Pravest. Atas sebab itulah Koperasi memulakan tindakan undang-undang terhadap Pravest dan mengalami kerugian kewangan apabila perjanjian JV diisytiharkan batal dan tidak sah. Kecuaian rakan-rakan kongsi tersebut menyebabkan kerugian kepada Koperasi (lihat perenggan 36–37).

(5) Hakim bicara tidak membenarkan Koperasi membayar ganti rugi sebanyak RM1,134,397 yang perlu dibayar Pravest dalam saman antara kedua-dua pihak. Hakim terkhilaf dalam meneliti ujian 'tetapi untuk' untuk menentukan punca kerugian atau kecederaan kepada plaintif dalam kes tort. Koperasi telah membuktikan bahawa 'tetapi untuk' representasi palsu rakan kongsi bahawa mereka bertindak untuk Pravest, Koperasi tidak akan menyaman Pravest untuk menguatkuasakan hak-haknya di bawah perjanjian JV. Hubungan penyebab tort yang dilakukan oleh rakan-rakan kongsi tersebut dan ganti rugi yang diarahkan oleh Koperasi untuk membayar Pravest telah terbukti dengan jelas dan oleh itu rayuan berkenaan dengan kepala kerugian ini perlu dibenarkan (lihat perenggan 41–44).

(6) Hakim bicara tidak membenarkan tuntutan Koperasi terhadap komisen sebanyak RM1,166,000 yang didakwanya telah dibayar broker

berhubung transaksi JV itu atas alasan kerugian itu belum terbukti. Oleh itu, mahkamah ini tidak akan mengganggu keputusan itu. Begitu juga dengan budi bicara hakim bicara untuk menolak pemberian ganti rugi teruk dan teladan kepada Koperasi atas alasan ia tidak dijamin, juga tidak akan diganggu oleh mahkamah ini. Oleh kerana kos RM30,000 yang diberikan kepada Koperasi pada akhir perbicaraan tidak mencukupi, mengganggu budi bicara hakim perbicaraan untuk menganugerahkan jumlah itu tidak boleh dilakukan oleh mahkamah ini (lihat perenggan 45–51).]

Cases referred to

CIMB Bank Berhad v Veeran a/l Ayasamy [2015] MLJU 993; [2015] 7 CLJ 289, CA (refd)

Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29, CA (refd)

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, HL (refd)

Ng Pak Cheong v Global Insurance Co Sdn Bhd [1995] 1 MLJ 64, HC (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

Rookes v Barnard [1964] 1 All ER 367, HL (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)

Seek Siew Nygt & Anor v Firent Management Services Sdn Bhd & Ors [2007] 1 MLJ 171, HC (refd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)

Sumitomo Bank Ltd v Kartika Ratna Thahir & Ors and another matter [1993] 1 SLR 735, HC (refd)

Legislation referred to

Courts of Judicature 1964 s 69

Valuers, Appraisers and Estate Agents Act 1981 s 30(3)

Appeal from: Civil Suit No 22NCVC-52–09 of 2016 (High Court, Kuantan)

Alan Wong Teck Wei (Nurul Azureen bt Ahsin with him) (Zain Megat & Murad) in Civil Appeal No C-02(NCVC)(W)-554–03 of 2019 for the appellant.

Krishnan a/l Narayanan Nair (Nanthini Nair a/p Ramakrishna with him) (N Krishnan Nair & Co) in Civil Appeal No C-02(NCVC)(W)-555–03 of 2019 for the appellant.

Krishnan a/l Narayanan Nair (Nanthini Nair a/p Ramakrishna with him) (N Krishnan Nair & Co) in Civil Appeal No C-02(NCVC)(W)-554–03 of 2019 for the respondent.

Alan Wong Teck Wei (Nurul Azureen bt Ahsin with him) (Zain Megat & Murad) in Civil Appeal No C-02(NCVC)(W)-555–03 of 2019 for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] There are two appeals before us. Both appeals originate from the High Court after a full trial. We shall refer to the parties by their original titles of plaintiff and defendants. In Appeal C-02 (NCvC)(W)-554–03 of 2019, the second and third defendants have appealed against the decision of the High Court which found them liable. In Appeal C-02 (NCvC)(W)-555–03 of 2019, the successful plaintiff has appealed against the refusal of the High Court to award all the damages prayed in the statement of claim.

CASE FOR THE PLAINTIFF

[2] Briefly stated, the background facts of the claim are as follows. The plaintiff is a registered cooperative body. The first defendant is an individual. He did not defend the action and judgment in default was entered against him before the trial. In the judgment of the trial judge, he was referred to as 'DSN' which stands for 'Dato' Seri Nazrul'. We shall refer to him likewise. The second and third defendants are partners of the law firm of Tetuan Khalek Awang & Associates which is based in Kuala Lumpur. We shall refer to them collectively as the defendants where necessary. The facts underlying the claim of the plaintiff as summarised by the learned High Court judge arose in the following way.

[3] Around June of 2010, a broker by the name of Tan pitched a joint venture project to the plaintiff to plant oil palm on an 850.03 acre parcel of land belonging to PJD Pravest Sdn Bhd (Pravest). He brought the company secretary of the plaintiff (PW1) and representatives of two companies, ie, Wonderful Mineral Resources Sdn Bhd and Karisma Sempurna Sdn Bhd to Tetuan Khalek Awang & Associates. The said companies were the proposed partners in the said joint venture. At the law firm of Tetuan Khalek Awang & Associates, PW1 was introduced to one Lukman. It appears that Lukman played a crucial role at the beginning of the wheeling and dealing affair that led the plaintiff to lose a large sum of money. But there was no dispute that he was employed as the legal assistant at Tetuan Khalek Awang & Associates. Lukman told PW1 that the law firm of Tetuan Khalek Awang & Associates had been appointed to represent Pravest in the joint venture project in question. PW1 was also told that DSN who was then 29 years old, was the chairman of Pravest. At a follow up meeting, PW1 was given the company resolution of Pravest pertaining to the project and a copy of the letter purporting to appoint the law firm of Tetuan Khalek Awang & Associates as its solicitor. Both documents were dated 6 June 2010.

A **[4]** The parties then proceeded to do the needful to enter into a joint venture agreement. The plaintiff appointed Tetuan Sucha Singh & Partners as its solicitor. Wonderful Mineral Resources Sdn Bhd appointed Tetuan Kal & Partners. Karisma Sempurna Sdn Bhd did not appoint any solicitor. DSN demanded RM500,000 from the plaintiff through Tetuan Khalek Awang & B Associates as consideration for executing the joint venture agreement.

[5] The consideration stated in the joint venture agreement was not RM500,000 but it was only RM1. It was a profit sharing joint venture C arrangement. However, the plaintiff paid the sum of RM500,000 that was demanded by DSN through Tetuan Khalek Awang & Associates. The payment was acknowledged by Tetuan Khalek Awang & Associates. The money was released to DSN directly after deduction of RM5,000. It was not released to the account of Pravest. The joint venture agreement was signed by the plaintiff, D Wonderful Mineral Resources Sdn Bhd and Karisma Sempurna Sdn Bhd on the one side and purportedly by Pravest who is the land owner on other side. Two directors of Pravest had purportedly pre-signed the document. It was later proved in the suit (Suit No 22–55 of 2011 Kuantan High Court) between the plaintiff and Pravest that their signatures were forged. The essential term of the E joint venture agreement was that Pravest leased its land to the plaintiff for the purpose oil palm cultivation for a share of profits.

[6] Following the execution of the joint venture agreement, the plaintiff's partner, Wonderful Minerals Resources Sdn Bhd commenced initial work on F the land. However, on 8 March 2011, Pravest prevented Wonderful Mineral Resources Sdn Bhd who was party to the joint venture agreement from carrying out further works. Tetuan Khalek Awang & Associates was informed of the incident on the same day. On 10 March 2011, Tetuan Khalek Awang & Associates wrote to Tetuan Kal & Partners to confirm that the land belonged to G their client (Pravest) and that they had been given permission to continue with the works. On the following day (11 March 2011), Tetuan Khalek Awang & Associates received a letter from the law firm of Tetuan Cheang & Ariff who stated that they are acting for Pravest. Tetuan Cheang & Ariff denied that the directors of Pravest signed the said joint venture agreement. It was suggested in H the letter that fraud had been committed against Pravest. The letter was copied to Tetuan Kal & Partners who represented Wonderful Minerals Resources Sdn Bhd. The plaintiff immediately caused all works on the land to come to a halt. In accordance with the terms of the joint venture agreement, the plaintiff took legal action against Pravest. The plaintiff also obtained an interim injunction I against Pravest. The matter proceeded to full trial. The two directors of Pravest who had purportedly signed the joint venture agreement denied that the signatures were theirs. Handwriting expert was tendered to support their assertion. At the conclusion of trial, the suit of the plaintiff was dismissed by the High Court and the counterclaim of Pravest was allowed. The joint venture

agreement was declared null and void. The plaintiff was ordered to pay damages to Pravest in the sum of RM1,104,402.91. Upon legal advice, the plaintiff did not proceed to appeal the decision to the Court of Appeal. But the plaintiff turned its attention to Tetuan Khalek Awang & Associates.

[7] The suit of the plaintiff against the second and third defendants who are partners of Tetuan Khalek Awang & Associates is based on fraud, fraudulent misrepresentation, conspiracy and/or negligence. The other partners of the plaintiff in the joint venture agreement did not participate in the suit.

THE DEFENCE

[8] The second and third defendants denied knowledge that DSN was not who he claimed to be. They said that DSN produced the letter of Pravest purporting to appoint Tetuan Khalek Awang & Associates, the company resolution of Sykt Pravest Sdn Bhd pertaining to the joint venture project and original title deed of the land in question. Therefore, the second and third defendants had no reason to be suspicious. The second and third defendants also said that the payment of RM500,000 as consultation fee to DSN was authorised by the company resolution of Pravest.

[9] In the premises, the second and third defendants denied committing fraud or conspiracy to defraud and denied conducting themselves negligently. They also denied owing a duty of care to the plaintiff who had appointed its own solicitor to act in the matter.

DECISION OF THE HIGH COURT

[10] The High Court found that the second and third defendants had conspired with the first defendant to commit fraud in representing that their law firm had been appointed to act for Pravest in the joint venture arrangement. He awarded relief as follows:

(a) RM500,000 that represented the sum paid to the law firm of Tetuan Khalek Awang & Associates;

(b) RM305,223.45 that represents the sum paid to Eastern Replanting and Trading for initial works;

(c) RM113,995 that represents the legal fee that was paid to Tetuan Kal & Partners who were solicitors of the plaintiff in the litigation with Pravest; and

(d) costs of the action of RM30,000 and interest.

[11] The defendants have appealed against the decision. The learned High Court judge did not award other damages that were sought by the plaintiff. The commission of RM1,166,000 paid by the plaintiff to the brokers through Tetuan Kal & Partners was disallowed. The damages of RM1,134,397 that was paid by the plaintiff to Pravest following the failed lawsuit was disallowed. The plaintiff claimed for aggravated and exemplary damages. They prayed for RM500,000 for each head of damages. It was also disallowed. All the above are the subject matter of the appeal of the plaintiff.

GROUNDS OF APPEAL

[12] The second and third defendants submitted that the High Court erred in finding that they committed fraud or conspired to commit fraud with the first defendant against the plaintiff. They submitted that the High Court also applied the wrong standard of proof in making the said finding of fraud. The second cause of action on which the claim of the plaintiff was based was negligence. The second and third defendants' case is that they owed no duty of care to the plaintiff who had retained their own solicitor. In any event, it was argued that negligence was not proved against the second and third defendants. Even if negligence was proved, it cannot be equated to commission of fraud or conspiracy to commit fraud.

[13] Having regard to the respective appeals and the submissions of the parties, the main issues that arise are whether the second and third defendants had committed fraud against the plaintiff and had also committed the tort of negligence. In respect of the appeal of the plaintiff, the main issue would be whether the High Court erred in not granting all the damages that were sought. We shall first deal with the appeal of the defendants and then go on to consider the appeal of the plaintiff.

FRAUD AND CONSPIRACY

[14] As we said earlier, the learned trial judge found that the plaintiff proved fraud and conspiracy successfully against the law firm of the second and third defendants which caused them to part with money and invest in the joint venture transaction to develop the land in question. The main ground of appeal was that there was not enough evidence for the said finding and that the learned trial judge misdirected himself on the standard of proof for fraud and had also misappreciated the evidence.

[15] We shall now consider the issue of standard of proof in respect of the plea of fraud. The trial judge said that the standard of proof to prove the claim was on a balance of probabilities. Counsel for the plaintiff cited the case of *Seek Siew Nygt & Anor v Firent Management Services Sdn Bhd & Ors* [2007] 1 MLJ

171 and submitted that fraud requires a higher standard of proof. He cited the following passage from the judgment:

> Now it is established law that fraud, such as fraudulently forging a signature upon a transfer, requires a higher standard of proof than the ordinary civil standard of proof upon a balance of probabilities.

[16] In our view, there was nothing wrong in the standard of proof applied by the learned trial judge. The above-mentioned case was decided in 2007. Since the decision in the landmark Federal Court case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1, the law in this country is that there are only two standards of proof, ie beyond reasonable doubt for criminal cases and balance of probabilities for all civil cases even if criminality is alleged. The previous position in the law that a plea of civil fraud requires a higher standard of proof than balance of probabilities was reversed and restated. The following passage of the judgment of the Federal Court quite clearly expounds the present state of the law:

> [49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In Re B (Children)*. It is this: *that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases.* As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. (Emphasis added.)

[17] During oral argument, counsel for the defendants argued that even if the standard of proof is now on a balance of probabilities, it is 'higher' for fraud. We respectfully disagree. As stated in the *Sinnaiyah* case, there are only two standards of proof, ie beyond reasonable doubt and balance of probabilities. There is no intermediate standard of proof between the two. Thus, although the allegation against the second and third defendants is fraud or conspiracy or fraudulent misrepresentation, the question that the trial judge had to ask and answer was whether the plaintiff had proved it on a balance of probabilities on the evidence presented.

[18] The learned trial judge held that there was sufficient circumstantial evidence to find that the second and third defendants had conspired with the first defendant to cheat the plaintiff into entering into the joint venture agreement. His Lordship also found that Tetuan Khalek Awang & Associates fraudulently misrepresented that the plaintiff could develop the land in question when confronted with the letter of Tetuan Cheang & Ariff that denied knowledge of said joint venture agreement on the part of Pravest. In making this finding, the trial judge considered the suspicious inconsistencies and discrepancies surrounding the transaction. These facts led the learned trial

judge to disbelieve the defendants' assertion that they did not know that DSN was not authorised by Pravest. They are as follows.

[19] DSN is a 29-year old who had travelled all the way from Kuantan to Kuala Lumpur to find a law firm to handle the transaction in question. The documents that DSN brought with him for the joint venture agreement should have aroused suspicion but were ignored by the defendants. DSN claimed to be the chairman of the Pravest. However, the company resolution from Pravest in respect of the joint venture agreement that DSN produced did not say that he was the chairman. More importantly, the company resolution also did not authorise DSN to deal with the plaintiff in respect of the joint venture agreement. In fact, at the earlier trial in the suit between plaintiff and Pravest, Lukman (legal assistant at Tetuan Khalek Awang & Associates) admitted that he was aware that purported company resolution did not to authorise DSN and that he asked for such authorisation. None was forthcoming but yet Tetuan Khalek Awang & Associates decided to go ahead with securing the signatures of the plaintiff and their partners on the joint venture agreement. It must be mentioned here that the notes of proceeding of the earlier trial between plaintiff and Pravest were by consent included in Part A of the bundle of documents.

[20] Lukman also said a search was done on Pravest with the Companies Commission (SSM). But this search was done only on 3 July 2010 whereas the joint venture agreement was prepared on 16 June 2010. DSN's name was not listed as a director in the SSM search result. However, this fact did not trouble Lukman or the defendants. The name of one of the directors of Pravest in the SSM search result also did not match the name in the company resolution as it was wrongly spelt. Furthermore, the learned trial judge had reason to believe that the company resolution of Pravest was prepared and backdated after it was signed. This is because the reference to the joint venture agreement in the company resolution was in the past tense. The letter appointing the law firm of Tetuan Khalek Awang & Associates by Pravest is dated the same day as the company resolution. However, the learned trial judge found it to be suspicious for the following reasons. The address of Pravest in the letter was stated to be in Kuantan whereas in the SSM search result, the address was in Kuala Lumpur. The company contact details such as telephone number, facsimile number, email address and website address were not stated in the letterhead. Tetuan Khalek Awang & Associates was also not in the panel of lawyers appointed to act for Pravest either.

[21] The learned trial judge also found that the manner that the sum of RM450,000 was released by Tetuan Khalek Awang & Associates was suspicious. This sum of money was paid by the plaintiff to Tetuan Khalek Awang & Associates. Even if it is accepted that the defendants did not know

that the company resolution was a forged document, the sum of RM450,000 was released to DSN in contravention of the company resolution which states that only RM150,000 maybe so released. In any event, the defendants should have asked whether it was proper to release such a big sum directly to a person claiming to represent a company. The defendants never cross checked directly with anyone from Pravest whether DSN was authorised to collect the payment personally.

[22] In written submissions, counsel for the defendants said that the trial judge erred in finding that the plaintiff proved fraud or conspiracy for three main reasons:

(a) the trial judge failed to appreciate that the alleged forged documents were not prepared by the second and third defendants;

(b) the trial judge erred by deciding that the acts of negligence purportedly committed by the second and third defendants are sufficient to prove fraud or conspiracy; and

(c) the trial judge erred in finding fraud or conspiracy without cogent evidence.

[23] We are mindful that counsel for plaintiff correctly submitted that the element of deceit must be established to support a plea of fraud. Suspicion or failure on the part of the defendants alone is not enough. The plaintiff must prove dishonest intent on the part of the defendants. He quoted the following passage from the Court of Appeal case of *CIMB Bank Berhad v Veeran a/l Ayasamy* [2015] MLJU 993; [2015] 7 CLJ 289:

> The elements of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the third defendant. There can never be fraud and/or conspiracy cannot exist, where the intent to deceive does not exist.

[24] Counsel for plaintiffs submitted that the trial judge merely considered the fact that the defendants should have been put to further inquiry because of the presence of suspicious circumstances to make a finding of fraud or conspiracy. He said that deceit or dishonesty on the part of the defendants was not proved. He said that it was the unlicensed broker by the name of Tan who introduced DSN to the legal assistant at the firm Tetuan Khalek Awang & Associates. The defendants were not aware that DSN was a fraudster.

[25] In respect of the tort of conspiracy, he submitted that the elements to prove the said tort were not proved. He cited the Court of Appeal case of *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 where the ingredients of the tort of conspiracy were identified in the following

passage of the judgment:

> [32] In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:
>
> (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;
>
> (c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar;
>
> (d) damage is an essential element and where damage is not pleaded the statement of claim may be struck out.
>
> (see *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ Rep 243).

[26] Counsel for the defendants submitted that a prior agreement between DSN and the defendants to injure the plaintiff was not proven in this case. He said the joint venture agreement was not prepared by the law firm of Tetuan Khalek Awang & Associates. He said the role of Tetuan Khalek Awang & Associates was nothing more than facilitating the transaction in question for a paltry fee of only RM5,000 and that the defendants were not aware that DSN was a fraudster.

[27] We find no merit in the above submission for the following reasons. The learned trial judge decided that fraud and conspiracy to defraud was proved on a balance of probabilities not merely because of the presence of circumstances that ought to have put the defendants to further inquiry. The trial judge had regard to inferential evidence that pointed to the involvement of the defendants in the scheme to defraud the plaintiff of the sum of RM500,000 and to make them believe that Pravest had given consent to the joint venture agreement to develop the land in question. We shall advert to this evidence below.

[28] As the learned trial judge said in his judgment, the SSM search that was conducted about two weeks after preparation of the joint venture agreement should have alerted defendants about the falsity of the claim of DSN that he was authorised to represent Pravest. However, the defendants failed to alert the plaintiff or their solicitors that DSN was not even a director of Pravest. The joint venture agreement was signed by the plaintiff on 29 July 2010. Months later, on 11 March 2011, Tetuan Khalek Awang & Associates received a letter from Tetuan Cheang & Ariff about the joint venture agreement. It was clear from the letter that Pravest had not given consent to the joint venture agreement. It was also clear that Pravest had not authorised Tetuan Khalek Awang & Associates to act for the company. At the very least, at the point of time, the defendants would have known absolutely that DSN was a cheat who

pretended to represent Pravest. However, the defendants perplexing reaction to this letter was to maintain the pretence that Pravest had properly appointed them in the joint venture agreement transaction. It must be recalled that a day earlier, Tetuan Khalek Awang & Associates had written to Tetuan Kal & Partners to say that their 'client owned the land'.

[29] Counsel for the defendants argued before us that his clients had no knowledge of the deceit of DSN. But as we said earlier, the second and third defendants would have known of the deceit by 11 March 2011 because of the letter from Tetuan Cheang & Ariff who acted for Pravest. Because of the assurance of the defendants at that point in time that they properly acted for Pravest in the joint venture agreement, the plaintiff and Pravest got involved in serious litigation subsequently over the land in question. The plaintiff obtained injunction to stop Pravest from interfering with its partner who was developing the land. This injunction was set aside later and the plaintiff ultimately lost the case as it was proven at the trial that Pravest never authorised anyone to the sign the joint venture agreement on its behalf. Counsel for defendants said that the defendants were also victims of the fraud committed by DSN. However, the learned trial judge noted that the second and third defendants did not appear to be aggrieved or upset with DSN for allegedly misleading them. Evidence was tendered that the second defendant was the company secretary of KPPHHB Consult Sdn Bhd which was owned by the family of DSN from 6 May 2014 until the time of trial. The father of DSN a director of this company. The registered address of the company was the same address as Tetuan Khalek Awang & Associates. Similarly, the third defendant remained the secretary of another company, ie KPHHB Sdn Bhd which was also owned by the family of DSN from 20 November 2013 until the time of trial. When the second defendant was questioned why he commenced the business relationship with DSN after having realised in 2011 that the latter was a cheat, he merely said that he has to be more careful. The exchange between the second defendant and counsel for the plaintiff is as follows:

S: Adakah kamu dan juga Defendan ketiga tarik diri dari menjadi setiausaha?

J: Saya rasa tidak ada.

S: Setakat tarikh 2014 memang kamu dan Defendan ketiga dilantik. Betul?

J: Ya.

S: Iaitu selepas mengetahui penipuan ini?

J: Tapi kita lebih berhati-hati selepas mengetahui.

S: Soalan saya bukan itu. Soalan saya walaupun kamu tahu dia tipu kamu kerana itu kamu disaman di Mahkamah tapi kamu masih bertindak untuk dia. Betul?

J: Betul. Untuk syarikat saja.

S: Pada tahun 2011 tindakan antara Koperasi terhadap Pravest memang telah pun bermula. Betul?

J: Ya.

S: Dan tindakan yang melibatkan yang mana Koperasi telah menyaman kamu di Mahkamah Tinggi Kuantan telah dimulakan pada tahun 2013 dan kes 22NCVC-54-09/2013?

J: Ya.

S: Jadi walaupun kamu disaman atas penipuan Nazrul kamu masih pada tahun 2014 tertindak untuk dia. Betul?

J: Ya.

[30] The learned trial judge also found that the evidence in respect of the fees charged by Tetuan Khalek Awang & Associates for its services in the joint venture agreement to be dubious and inconsistent. The second defendant claimed that he was authorised to deduct RM5,000 as fees from the payment of RM500,000 by the plaintiff. However, Lukman, the legal assistant at Tetuan Khalek Awang & Associates told the court that the legal fee of RM8,175 was paid in cash by DSN. The learned trial judge found that it was incredible that there should be contradictory evidence even in respect of the fees charged by Tetuan Khalek Awang & Associates. His Lordship said that the contradiction cannot be satisfactorily explained unless the transaction in question was tainted by fraud.

[31] The learned trial judge said that his finding on fraud and conspiracy was based was based on circumstantial evidence. There is certainly nothing wrong with this approach. It is not expected that fraudsters, if they can help it, would leave a trail of direct evidence to implicate them in their crime. In *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64, Mohamed Dzaiddin FCJ sitting as High Court judge cited the Singapore case of *Sumitomo Bank Ltd v Kartika Ratna Thahir & Ors and another matter* [1993] 1 SLR 735 and said as follows:

> ... it is not the law of evidence that every step in the allegation of fraud has to be proved by calling live and admissible evidence, nor is it the law that fraud cannot be inferred in the appropriate case ...

[32] However, as stated in the above-mentioned case, the circumstantial evidence must be compelling and convincing. We have referred to the evidence that was considered by trial judge for disbelieving the second and third defendants that they did not know that DSN was a fraudster. We are of the view that the trial judge was not plainly wrong in drawing the inferences that he did from the ample circumstantial evidence to conclude that the second and third defendants as partners of Tetuan Khalek Awang & Associates were not innocent of the wrong doing committed by DSN and that they worked hand in glove with him.

[33] To recapitulate the evidence, the defendants as lawyers should have known that the documents presented by DSN were dubious. Even if 'mere omissions' and 'failure to be put to further inquiry' is not sufficient for a finding of fraud, fraudulent misrepresentation or conspiracy to commit fraud as submitted by counsel for defendants, there was evidence that the second defendant knew for a fact from the SSM search that DSN was not listed as a director of Pravest. This was confirmed some months later when Tetuan Cheang & Ariff wrote on behalf of Pravest to challenge the trespass onto their land by the partner of the plaintiff. This letter would have also confirmed the fact that DSN was a fraudster and that the law firm of Tetuan Khalek Awang & Associates was never appointed by Pravest. However, the second and third defendants warranted to the plaintiff that all was well and that their client owned the land. This representation caused the plaintiff to be embroiled in avoidable expensive litigation with Pravest which ultimately failed. Furthermore, as pointed out by the learned trial judge, the second and third defendants had maintained a business relationship with DSN as company secretary of companies controlled by his family up to the time of trial. The second and third defendants had also improperly released monies to DSN. Even the evidence in respect of the fees paid to their law firm was inconsistent and contradictory.

[34] Thus, this is not merely a case where the suspicious circumstances should have put Tetuan Khalek Awang & Associates to further inquiry. The warning lights were flashing and alarm bells had gone off from the start. The alarm bells would have become deafening when Tetuan Cheang & Arif wrote to the plaintiff on 11 March 2011. But they were deliberately ignored. Therefore, the learned High Court was not wrong to infer culpability for fraud on the part of the defendants after considering all the circumstances. In the premises, having regard to the prevailing standard of proof which is on a balance of probabilities, in our view, all the strands of circumstantial evidence that was considered by the trial judge were sufficient to find the second and third defendants liable for fraud and conspiracy to defraud on a balance of probabilities.

NEGLIGENCE

[35] The learned trial judge, apart from alluding to the negligent acts of the second and third defendants, did not make a specific finding on this plea although it was pleaded with particulars and evidence to prove it was adduced. Nonetheless, under s 69 of the Courts of Judicature 1964 (Revised 1972), this court is not precluded from considering the said plea.

[36] We do not wish to repeat the evidence relating to negligence in detail as they were set out in the foregoing passages in relation to fraud. Counsel for

defendants submitted that there was no negligence in this case for the following reasons. The plaintiff was represented by its own solicitors when joint venture agreement was executed. Thus, Tetuan Khalek Awang & Associates did not owe a duty of care to the plaintiff. In our view, this argument misses the important point that under common law, a professional person who makes a negligent misstatement to another is liable for the consequences if the latter relies on it and suffers loss irrespective of the fact that there is no contractual relationship. The duty arises in the law of tort. The essential ingredient of the tort is reliance on the statement of the professional person. This principle was first enunciated in the well-known case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575.

[37] In the instant case, the defendants had represented to the solicitors of the plaintiff that they were instructed to act for Pravest based on letter given to them by DSN. As we said earlier, DSN's name was not even listed as a director in the SSM search obtained some days after the preparation of the joint venture agreement. However, the second and third defendants never bothered to inquire into this extremely suspicious circumstance and alert the solicitors of the plaintiff. Even after the letter of Tetuan Cheang & Ariff was brought to the attention of the second and third defendants, they insisted without any justification that the joint venture agreement had been properly executed with the authority of Pravest. It was for this reason that the plaintiff commenced legal action against Pravest and suffered financial loss when the joint venture agreement was declared null and void. In the premises, there was overwhelming evidence that the second and third defendants had been negligent in stating at outset they acted for Pravest when the joint venture agreement was executed. They were also negligent in maintaining that false statement when confronted with the said letter from Tetuan Cheang & Ariff in which Pravest denied entering into any joint venture agreement. The negligence of the second and third defendants had therefore caused loss to the plaintiff.

APPEAL OF THE PLAINTIFF

[38] The learned trial judge granted judgment to the plaintiff by ordering the defendants to pay as follows:

(a) the sum of RM500,000 that was deposited with Tetuan Khalek Awang & Associates;

(b) the sum of RM305,223.45 that the plaintiff paid to contractor to the develop the land;

(c) legal expense of RM113,995 that was incurred in the litigation against Pravest; and

(d) costs of RM30,000.

[39] However, the trial judge did not grant the following claims of the plaintiff:

(a) the sum of RM1,134,394 that the plaintiff was ordered to pay Pravest in the earlier suit;

(b) the sum of RM1,166,000 that was paid to the brokers and agents by plaintiff in relation to the joint venture agreement;

(c) exemplary damages of RM500,000; and

(d) aggravated damages of RM500,000.

[40] The plaintiff has also appealed against the costs of RM30,000 that was granted by the High Court which was said to be too low considering the work done at the trial.

[41] The learned trial judge was aware that the plaintiff had been ordered by the Kuantan High Court to pay damages to Pravest as a result of the undertaking given in the injunction application. In fact, he found that this loss was proved. This finding appears in the following passage of the judgment:

> Ganti rugi ini adalah pampasan yang telah ditaksir oleh Mahkamah Tinggi Kuantan dalam Guaman 2011. Eksibit P39 ialah surat peguam cara Plaintiff yang membuktikan RM1,134,397.00 telah dibayar kepada peguam cara Pravest, Tetuan Cheang & Ariff.

[42] However, the learned trial judge did not compensate the plaintiff for this loss because Tetuan Khalek Awang & Associates was not a party in that suit and the plaintiff was ordered to pay damages to Pravest pursuant to an undertaking they had given at the outset of the unsuccessful litigation. In our view, the learned trial judge erred in his reasoning. His Lordship failed to consider the 'but for' test to determine causation of loss or injury to a plaintiff in tort cases. In *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29, this court referred to the test to determine causal link between the wrongdoing of a defendant and loss in the following passage from Clerk & Lindsell para 2-09:

> The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage. The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant? The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign

responsibility to that damage. The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant?

[43] In the instant case, the learned trial judge had in his judgment stated that the defendants had falsely represented to the plaintiff that they were authorised to act for Pravest. His Lordship also referred to the evidence that the defendants maintained the position that they were acting for Pravest and that the land belonged to their 'clients' even after Pravest complained about the works being carried out on the land. Tetuan Cheang & Ariff issued a letter on behalf of Pravest to Tetuan Khalek Awang & Associates to disavow knowledge of the joint venture agreement the next day. But the defendants did not come clean and admit to not being authorised to act for Pravest. The plaintiff proved that 'but for' the false representation of the defendants that they acted for Pravest, they would not have sued to enforce their rights under the joint venture agreement. In the premises, the causal link between the tort committed by the defendants and the damages that the plaintiff was ordered to pay Pravest was clearly proved. Therefore, it is not relevant that the law firm of the defendants was not a party to that suit or that the damages assessed against the plaintiff was pursuant to the undertaking given by them in the injunction application. In our view, what was relevant was that there was direct causal link between the tort committed by the defendants and the said loss suffered by the plaintiff.

[44] We also find no merit in the submission of counsel for defendants that the filing of the injunction application by the plaintiff was new intervening act that broke the causal chain. As the plaintiff had invested large sums of money on the joint venture agreement based on fraudulent misrepresentation given by the defendants, it was reasonably foreseeable that they would defend their rights under it by legal action. Thus, the injunction application was not an act which was independent of the wrongdoing of the defendants. The defendants cannot impute it solely to the plaintiff in order escape compensating them for a foreseeable loss. Therefore, we shall allow the appeal of the plaintiff in respect of this loss.

[45] The plaintiff also appealed against the dismissal of its claim for the sum of RM1,166,000 that was paid as commission to brokers. The trial judge rejected this claim for two reasons. The first reason is that the payments offended s 30(3) of the Valuers, Appraisers and Estate Agents Act 1981 which states that it is illegal to pay commission to an unauthorised person, ie unlicensed brokers. He said that the plaintiff failed to prove that the brokers were licensed under the said Act. Although, illegality was not pleaded, the learned trial judge held that the court can take judicial notice of it. However, as pointed out by learned counsel for the plaintiff, the provision in its present

form came into effect only on 2 January 2018, ie after the commissions were paid to the brokers. On this point, we agree with counsel for the plaintiffs.

[46] The second reason of the trial judge was that the expense was not proved. He also said that the names of brokers were not mentioned in the statement of claim. The brokers were not called to give evidence either to prove the claim. A lawyer from Tetuan Kal & Partners was called to give evidence in respect the payments made to various brokers. The plaintiff's case is that the payments were made to the brokers 'to secure the joint venture agreement'. However, the plaintiff did not lead evidence on the necessity of this huge expense by calling the brokers apart tendering evidence of payment through their solicitor. In the premises, we are not minded to interfere with decision of the trial judge who said that the loss was not proved.

[47] In respect of the claim for aggravated and exemplary damages in total sum of RM1m which was disallowed by the trial judge, our view is that interference with the said decision is not warranted. Aggravated damages are granted as additional compensation for the loss suffered whereas exemplary damages are punitive in nature and is independent of injury.

[48] In *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, this court said as follows in respect of aggravated damages:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[49] The learned trial judge exercised his discretion not to award aggravated damages as he said that there was no evidence to support it. We cannot say he was plainly wrong as the plaintiff had been compensated for proven losses in addition to the further compensation that we are allowing in this appeal.

[50] In regard to exemplary damages, the Court of Appeal in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal*, after having considered the principles enunciated in the classic case of *Rookes v Barnard* [1964] 1 All ER 367 and recent developments, said as follows:

> Before departing, we would like to emphasis again that exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right. The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant. The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved. Exemplary damages must not be

uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular case.

[51] Although, we think the conduct of the defendants was unacceptable in this case, the learned trial judge having considered the overall circumstances and the compensation awarded, declined to make an award of exemplary damages. We see no reason not to defer to the exercise of the discretion of the trial judge. In the premises, the appeal in respect of the aggravated and exemplary damages is dismissed. In respect of the costs of RM30,000 awarded to the plaintiff at the end of the trial, since it was not manifestly inadequate, interference with the discretion of the trial judge is not warranted.

CONCLUSION

[52] In conclusion, the appeal of defendants is wholly dismissed. The appeal of plaintiff is allowed in part. The defendants are ordered to pay further damages to the plaintiff in sum of RM1,134,397. The defendant is ordered to pay costs of RM20,000 for Appeal 554 and costs of RM15,000 for Appeal 555.

Appeal dismissed.

Reported by Ashok Kumar